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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 SUSAN CHEN, et al.,

CASE NO. C16-1877JLR

11 Plaintiffs,

ORDER ON MOTION TO
12 v.
13 DISMISS

NATALIE D'AMICO, et al.,

14 Defendants.

15 **I. INTRODUCTION**

16 Before the court is Defendants City of Redmond (“the City”), Redmond Police
17 Department (“RPD”), RPD Officer Natalie D’Amico, former RPD Chief Ron Gibson,
18 and former RPD Assistant Chief Kristi Wilson’s (collectively, “City Defendants”) motion
19 to dismiss certain claims. (MTD (Dkt. # 79).)¹ Plaintiffs Susan (Shiying) Chen,

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22 ¹ Prior to filing the present motion, four of the five City Defendants filed a motion to
dismiss Plaintiffs’ first amended complaint. (See Moot MTD (Dkt. # 66); FAC (Dkt. # 21).)
The City did not join in that motion because the court had stricken the amended complaint
against the City. (See 10/16/17 Order (Dkt. # 53) at 6; 10/23/17 Order (Dkt. # 60) at 1-2.)

1 Naixiang (Nash) Lian, J.L, and L.L. (collectively, “Plaintiffs”) filed a response (Resp.
2 (Dkt. # 81)), City Defendants filed a reply (Reply (Dkt. # 82)), and Plaintiffs filed a
3 notice of supplemental authority (Notice (Dkt. # 84)). The court has considered the
4 parties’ submissions in support of and in opposition to the motion, the relevant portions
5 of the record, and the applicable law. Being fully advised,² the court GRANTS in part
6 and DENIES in part City Defendants’ motion to dismiss with leave to amend as
7 described herein.

II. BACKGROUND

9 Ms. Chen and Mr. Lian are the parents of J.L. and L.L. (SAC ¶¶ 3-6.) J.L. was
10 born in 2008, and L.L. was born in 2010. (*Id.* ¶¶ 5-6.) In 2012, J.L. was diagnosed with
11 gastrointestinal (“GI”) problems and Autism Spectrum Disorder. (*Id.* ¶¶ 24-25.) From
12 September 2012 to October 2013, Plaintiffs took J.L. to a number of clinics at Seattle
13 Children’s Hospital (“SCH”), as well as a naturopath, to address his GI issues. (*Id.*
14 ¶¶ 27-33.)

Subsequent to that motion, the court granted in part Plaintiffs' motion for leave to amend (*see* 11/30/17 Order (Dkt. # 73) at 20-21), and Plaintiffs filed a second amended complaint (SAC (Dkt. # 76)). The second amended complaint is now the operative complaint, rendering moot the City Defendants' initial motion to dismiss. (*See* MTD at 2 (acknowledging mootness of the first motion to dismiss); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 927 (9th Cir. 2012) (en banc) (recognizing the general rule that an amended complaint supersedes a previously filed complaint "and renders it without legal effect"). The court therefore DENIES that motion (Dkt. # 66) as moot.

² The parties do not request oral argument (*see* MTD at 1; Resp. at 1), and the court determines that oral argument would not be helpful to its disposition of the motion, *see* Local Rules W.D. Wash. LCR 7(b)(4).

1 On or about October 19, 2013, J.L. suffered significant GI problems. (*Id.* ¶ 34.)
2 Ms. Chen and Mr. Lian took J.L. to a number of clinics to have blood work done because
3 of creatinine levels in his blood that could harm his kidneys. (*Id.* ¶¶ 34-36.) The first
4 two clinics Plaintiffs went to refused to perform blood work. (*Id.*) SCH Urgent Care
5 Clinic, the third location Plaintiffs visited, agreed to perform the blood work and inform
6 Plaintiffs of any abnormal results. (*Id.* ¶ 36.)

7 The next day, Ms. Chen took J.L. back to SCH Urgent Care Clinic because his
8 condition had not improved. (*Id.* ¶ 38.) Upon returning to the clinic, Ms. Chen learned
9 that J.L.’s blood work from the previous day revealed dangerously high creatinine levels.
10 (*Id.*) The clinic recommended that Ms. Chen take J.L. to the emergency room (“ER”).
11 (*Id.*) The clinic had not notified Ms. Chen about the blood work results before she
12 brought J.L. back the following day. (*Id.*)

13 Based on the clinic’s recommendation, Ms. Chen and Mr. Lian took J.L. to the
14 emergency room at SCH. (*Id.*) Medical staff supervised J.L.’s condition for several
15 hours and discharged him later that night. (*Id.* ¶ 39.) They advised Ms. Chen and Mr.
16 Lian to follow up with Dr. Halamay—who was not J.L.’s typical primary care doctor—in
17 one to three days. (*Id.*)

18 After their visit to the ER at SCH, Ms. Chen took J.L. to see Dr. Halamay on
19 October 23, 2013. (*Id.* ¶ 41.) Dr. Halamay “took the positon that Ms. Chen should take
20 J.L. to the SCH emergency department for admission” based on an inaccurate belief that
21 Mr. Chen and Mr. Lian had not already taken J.L. to the ER just a few days before. (*Id.*)
22 Plaintiffs contend that “[a]fter Ms. Chen expressed her dissatisfaction with Dr.

1 Halamay's treatment of her and J.L." and left a complaint about the treatment with the
2 receptionist, Dr. Halamay referred J.L.'s case to DSHS's Child Protective Services
3 ("CPS"). (*Id.*)

4 CPS visited Plaintiffs' home on October 23, 2013, to investigate Dr. Halamay's
5 allegation. (*Id.* ¶ 43.) The CPS social worker convinced Ms. Chen and Mr. Lian to take
6 J.L. to SCH, where he was found to be malnourished and subsequently placed into
7 protective custody. (*Id.* ¶¶ 43-44.) On October 24, 2013, Officer D'Amico and an
8 unidentified RPD officer searched Ms. Chen and Mr. Lian's apartment without a warrant
9 or an interpreter. (*Id.* ¶ 46.) RPD then removed L.L. from Ms. Chen and Mr. Lian's
10 custody.³ (*Id.* ¶¶ 48-49.)

11 Soon after the children's removal, Officer D'Amico led an investigation into
12 possible child neglect by Ms. Chen. (*Id.* ¶ 59.) On December 9, 2013, Officer D'Amico
13 signed a probable cause affidavit to file criminal charges against Ms. Chen. (*Id.* ¶ 65.)
14 Plaintiffs allege that the affidavit, made upon Officer D'Amico's knowledge, contained
15 untrue statements and omitted exculpatory information. (*Id.* ¶¶ 66-72.) On December
16 13, 2013, Officer D'Amico sent her investigation report and probable cause affidavit to
17 the King County Prosecuting Attorney, whose office filed a criminal information against
18 Ms. Chen on January 31, 2014. (*Id.* ¶¶ 85-86.) In early 2014, Ms. Chen was arraigned,
19 imprisoned for one day, and released without bail.⁴ (*Id.* ¶ 87.) Mr. Lian was not charged

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³ A court later terminated the dependency action DSHS instituted. (*Id.* ¶ 79.)

22 ⁴ Plaintiffs do not allege specific dates for these events. (*Id.*)

1 with any crime arising from the alleged neglect. (*See id.* ¶ 21.) On September 19, 2014,
2 the Prosecuting Attorney's office dropped the charges against Ms. Chen. (*Id.* ¶ 88.)

3 Plaintiffs allege various constitutional violations pursuant to 42 U.S.C. § 1983 and
4 violations of Washington State law by City Defendants and unnamed John Does A-D;
5 Defendant Washington State Department of Social and Health Services ("DSHS"); and
6 10 named and unnamed DSHS employees.⁵ (SAC ¶¶ 7-20.) Relevant to City
7 Defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6),
8 Plaintiffs assert the following constitutional claims: (1) violation of Ms. Chen's Fourth
9 and Fourteenth Amendment rights due to her arrest and prosecution without probable
10 cause (*id.* ¶¶ 110-11); (2) violation of Ms. Chen's Fourteenth Amendment due process
11 right based on Officer D'Amico's failure "to use an interpreter to obtain reliable and
12 accurate testimony from Ms. Chen" (*id.* ¶ 112); (3) violation of Ms. Chen's right to equal
13 protection of the law due to selective prosecution and failure to provide Ms. Chen "an
14 opportunity to provide exculpatory testimony obtained without an interpreter" (*id.*
15 ¶¶ 114-15); and (4) violation of J.L.'s Fourteenth Amendment due process rights (*id.*
16 ¶ 113). Plaintiffs also bring claims against the City and RPD for those same
17 constitutional violations pursuant to *Monell v. Department of Social Services of City of*
18 *New York*, 436 U.S. 658 (1978); claims of supervisory liability against Chief Gibson and
19 Assistant Chief Wilson based on their roles in the constitutional violations; and a claim of
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22 ⁵ At this time, only City Defendants challenge the sufficiency of Plaintiffs' complaint.
(*See Not.* (Dkt. # 78) at 1 (withdrawing Defendants Kimberly R. Danner, Timothy Earwood, Jill
Kegel, Bill Moss, Kevin W. Quigley, Tom Soule, and DSHS's motion to dismiss).) For that
reason, the court does not address the claims against the other defendants.

1 malicious prosecution against Officer D'Amico, Chief Gibson, and Assistant Chief
2 Wilson. (*Id.* ¶¶ 119-41, 187-209.) The court now addresses City Defendants' motion to
3 dismiss. (*See* MTD.)

4 **III. ANALYSIS**

5 **A. Legal Standard**

6 Rule 12(b)(6) provides for dismissal of a complaint for "failure to state a claim
7 upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Although a plaintiff does
8 not have to make "detailed factual allegations," a complaint must include "more than an
9 unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556
10 U.S. 662, 678 (2009). In other words, a complaint must include sufficient factual
11 allegations to "state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl.*
12 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the
13 pleaded factual content allows the court to draw the reasonable inference that the
14 defendant is liable for the misconduct alleged." *Id.* Under Rule 12(b)(6), the court can
15 dismiss a complaint based on "the lack of a cognizable legal theory or the absence of
16 sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police*
17 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). When considering a motion to dismiss under
18 Rule 12(b)(6), the court construes the complaint in the light most favorable to the
19 nonmoving party, *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946
20 (9th Cir. 2005), and accepts all well-pleaded facts as true and draws all reasonable
21 inferences in the plaintiff's favor, *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135
22 F.3d 658, 661 (9th Cir. 1998).

1 **B. The Motion to Dismiss**

2 City Defendants first argue for dismissal of Plaintiffs' claims against the City for
3 failure to adequately allege municipal liability. (MTD at 6-9.) They further contend that
4 leave to amend those claims would be futile because Plaintiffs cannot plead the
5 underlying constitutional violations. (*Id.* at 9-13.) City Defendants then argue that (1)
6 qualified immunity bars Plaintiffs' Section 1983 claims against Officer D'Amico, Chief
7 Gibson, and Assistant Chief Wilson; (2) the applicable statute of limitations bars those
8 same claims against Chief Gibson and Assistant Chief Wilson; and (3) Plaintiffs fail to
9 adequately plead a claim of supervisory liability against Chief Gibson and Assistant
10 Chief Wilson.⁶ The court addresses the claims against the City first, followed by the
11 claims against the officers.

12 1. Municipal Liability

13 Defendants contend that Plaintiffs fail to plead municipal liability for their Section
14 1983 claims because the complaint lacks sufficient detail regarding a City policy causing
15 the constitutional violations. (MTD at 7.) Plaintiffs claim that the City is responsible for
16 Officer D'Amico's alleged constitutional violations because the City failed to (1) adopt
17 and implement policies (SAC ¶ 122-23), and (2) train or supervise RPD officers to ensure

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19 ⁶ City Defendants also move to dismiss Plaintiffs' request for punitive damages against
20 the City and to dismiss RPD as a party to the case. (MTD at 5-6, 13-14.) Plaintiffs do not object
21 to those requests. (Resp. at 22 (stating that "Plaintiffs do not object to the dismissal of their
22 prayer for punitive damages solely as to their direct claims against the City" or "to the dismissal
of their separate claims against RPD).) The court therefore grants City Defendants' motion to
dismiss RPD from the suit and Plaintiffs' request for punitive damages. (See 11/30/17 Order
(Dkt. # 73) at 2 n.2 (stating that because the RPD is a City department, it cannot be sued in its
individual capacity); *Ruvalcaba v. City of L.A.*, 167 F.3d 514, 524 (9th Cir. 1999) (stating that a
plaintiff cannot recover punitive damages from a municipality as a matter of law).

1 constitutional practices (*id.* ¶ 124). Plaintiffs assert that the City failed to adopt or
2 implement policies and to train and supervise regarding (1) preparing “probable cause
3 affidavits that do not contain material falsehoods or omissions”; (2) accounting for
4 “exculpatory evidence in order to refrain from prosecuting persons without probable
5 cause”; (3) not targeting “persons for investigation and prosecution on the basis of gender
6 or national origin or ethnicity”; (4) not using “unreliable testimony obtained from
7 witnesses who are not English proficient for use in prosecution unless there was a
8 qualified interpreter present at the interrogation”; and (5) providing “prosecutors with
9 exculpatory information to terminate criminal and/or dependency proceedings in order to
10 halt prosecutions not founded upon probable cause.” (*Id.* ¶¶ 122-24.) In response to City
11 Defendants’ motion, Plaintiffs argue that their complaint adequately pleads both that the
12 City’s actions and inactions led to the constitutional violations asserted. (Resp. at 5.)
13 The court addresses both theories of municipal liability, as well as City Defendants’
14 contentions regarding leave to amend these claims.

15 a. *Policy, Custom, or Practice*

16 To state a claim against a municipality under Section 1983, a plaintiff must allege
17 facts supporting the reasonable inference that a municipality adopted a policy, custom, or
18 practice that amounted to deliberate indifference to the plaintiff’s constitutional right and
19 resulted in a deprivation of the constitutional right. *See Monell*, 436 U.S. at 691-92; *see also Plumeau v. Sch. Dist. No. 40 Cty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997). A
21 plaintiff can plead a policy by supplying sufficient facts demonstrating that the
22 municipality (1) adopted an official policy or had an established custom that led to the

1 constitutional violation, (2) failed to act in a way that amounts to a policy of deliberate
2 indifference to constitutional rights, or (3) that an official with final policy-making
3 authority committed the constitutional violation or ratified a subordinate's violation. *See*
4 *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1249 (9th Cir. 2010), *overruled on*
5 *other grounds by Castro v. Cty. of L.A.*, 833 F.3d 1060 (9th Cir. 2016). A plaintiff's
6 allegations "may not simply recite the elements" of municipal liability and instead must
7 "put forth additional facts regarding the specific nature" of the alleged policy and its
8 relationship to the alleged constitutional violation. *AE ex rel. Hernandez v. Cty. of*
9 *Tulare*, 666 F.3d 631, 637 (9th Cir. 2012).

10 Under that standard, Plaintiffs fail to sufficiently allege facts from which the court
11 can reasonably infer a municipal policy, custom, or practice. (*See generally* SAC.) Their
12 complaint alleges only that "customs, longstanding practices, and official policies caused
13 the deprivation of Plaintiffs' constitutional rights." (*Id.* ¶ 125.) That formulaic recitation
14 falls far short of the pleading standard. *See AE ex rel. Hernandez*, 666 F.3d at 637;
15 *Ahmed v. City of Antioch*, Cal., No. 16-cv-01693-HSG, 2016 WL 8729938, at *5 (N.D.
16 Cal. July 1, 2016) (dismissing a *Monell* claim where the complaint did nothing more than
17 use "key buzzwords such as 'conformity,' 'customs,' 'policies,' and 'practices'"); *Alston*
18 *v. Tassone*, No. CIV S-11-2078 JAM GGH PS, 2012 WL 2377015, at *8 (E.D. Cal. June
19 22, 2002) (stating that a *Monell* claim "must consist of more than mere formulaic
20 recitations of the existence of unlawful policy customs or habits"). Thus, Plaintiffs fail to
21 state a claim based on this theory of municipal liability.

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1 **b. Inaction**

2 A municipality can also be liable “if it has a policy of inaction and such inaction
3 amounts to a failure to protect constitutional rights.” *Oviatt v. Pearce*, 954 F.2d 1470,
4 1474 (9th Cir. 1997); *see also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir.
5 2012) (“A policy of inaction or omission may be based on failure to implement
6 procedural safeguards to prevent constitutional violations.”). A plaintiff who asserts this
7 theory of liability faces “heightened requirements” because otherwise “when a municipal
8 employee commits a constitutional tort, it could always be alleged that the municipality
9 failed to enact a policy that would have prevented the tort.” *Id.* at 1143-44. Thus, to
10 adequately plead deliberate indifference in this context, a plaintiff must plead facts
11 supporting a reasonable inference that the municipality was on actual or constructive
12 notice that its inaction would likely result in a constitutional violation, *id.* at 1144, and
13 that the inaction was “the result of a conscious or deliberate choice among various
14 alternatives,” *Berry v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004) (internal citations
15 omitted).

16 Plaintiffs also fail to adequately plead facts supporting a theory of municipal
17 liability based on a policy of inaction. Although Plaintiffs identify a lack of policy in five
18 areas (*see SAC ¶¶ 122-24*), the complaint contains no facts regarding whether the City’s
19 inaction was the result of a conscious or deliberate choice or that the City knew that the
20 lack of policy in those areas would result in constitutional violations (*see generally id.*).
21 Rather, Plaintiffs merely restate the elements of a *Monell* claim, asserting that the City
22 had “awareness” its “acts and omissions violated Plaintiffs’ constitutional rights.” (*Id.*

¶ 126.) They also state that the City’s “acts and omissions” caused the constitutional deprivation through “deliberate indifference to the risk that [the City’s] customs, practices, and policies were inadequate to train RPD officers to prevent deprivation of rights”⁷ (*id.* ¶ 127), and the City’s failure to adopt such policies was “the moving force that caused the deprivation of Plaintiffs’ rights” (*id.*). However, simply invoking the phrases “deliberate indifference” and “moving force”—even when coupled with a statement of the policies Plaintiffs contend that the City should have adopted and enacted—is insufficient to withstand a motion to dismiss. *See Dougherty v. City of Covina*, 654 F.3d 892, 900-01 (9th Cir. 2011) (upholding the dismissal of a complaint that “pointed to no instances of deliberate indifference” or “any facts demonstrating that [the plaintiff’s] constitutional deprivation was the result of a custom or practice . . . or that the custom or practice was the ‘moving force’ behind his constitutional deprivation”); *United Motors Int’l, Inc. v. Hartwick*, No. CV 17-00243 BRO (Ex), 2017 WL 888304, at *14 (C.D. Cal. Mar. 6, 2017) (concluding that the complaint failed to state a *Monell* claim based on omissions or failures to act because it contained no allegations regarding a pattern of constitutional violations sufficient to demonstrate deliberate indifference).

Plaintiffs’ failure to train and supervise theory is even more deficient. To adequately plead municipal liability based on a failure to train or supervise, a plaintiff must allege that (1) the current training program is inadequate given the tasks the officers

⁷ In this regard, Plaintiffs conflate their failure to adopt and implement theory with their failure to train and supervise theory, which the court addresses below.

1 must perform; (2) the failure to train amounts to deliberate indifference of the rights of
2 the people with whom the officers will come into contact; and (3) the inadequate training
3 actually caused the deprivation of the constitutional right. *See Dougherty*, 654 at 900.
4 “A municipality’s culpability for a deprivation of rights is at its most tenuous where a
5 claim turns on a failure to train.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011). The
6 plaintiff must therefore allege facts that the defendant disregarded known or obvious
7 consequences arising from a particular omission in its training program that would cause
8 its officers to violate constitutional rights. *See Flores v. City of L.A.*, 758 F.3d 1154,
9 1159 (9th Cir. 2014).

10 Here, Plaintiffs do not identify what training and supervision practices are
11 deficient or how the deficiencies harmed Ms. Chen. *See Young v. City of Visalia*, 687 F.
12 Supp. 2d 1141, 1149-50 (E.D. Cal. 2009) (concluding that the complaint failed to identify
13 “what the training and hiring practices were, how the training and hiring practices were
14 deficient, or how the training and hire practices caused Plaintiff’s harm”). Indeed,
15 Plaintiffs allege only that the City failed to train and supervise officers in the five areas
16 identified above. (SAC ¶ 124.) Nowhere do they allege facts giving rise to the plausible
17 inference that the City’s existing training and supervisory programs are deficient. (*See*
18 *generally id.*) And as with their failure to adopt and implement theory, Plaintiffs state in
19 conclusory fashion that the City’s failure amounts to deliberate indifference and was the
20 moving force behind the alleged constitutional violations. (*See id.* ¶¶ 126-27.) For these
21 reasons, Plaintiffs fail to state a Section 1983 claim based on a failure to train and
22 supervise.

1 Because Plaintiffs' complaint contains insufficient factual allegations giving rise
2 to a reasonable inference of the City's liability, the court grants City Defendants' motion
3 to dismiss Plaintiffs' *Monell* claims.

4 c. *Leave to Amend Claims Against the City*

5 City Defendants argue that the court's dismissal of Plaintiffs' *Monell* claims
6 should be without leave to amend. (MTD at 9-10.) Specifically, they argue that
7 amendment would be futile because Plaintiffs' underlying constitutional claims are
8 deficient.⁸ (*Id.*) In essence, City Defendants challenge the sufficiency of the factual
9 allegations supporting the constitutional claims, and the court therefore analyzes whether
10 dismissal of those claims—and if so, leave to amend—is appropriate.

11 Before embarking on that analysis, the court first notes that futility alone justifies
12 denying leave to amend. *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015)
13 (citing *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)). Amendment is futile “if no
14 set of facts can be proved under the amendment to the pleadings that would constitute a
15 valid and sufficient claim or defense.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214
16 (9th Cir. 1988); *see also Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir.
17 1998) (“A claim in a proposed amended complaint is futile if it would be immediately
18 subject to dismissal pursuant to Rule 12(b)(6)”).

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21 ⁸ City Defendants challenge only Ms. Chen's claims related to the failure to use an
22 interpreter, for selective prosecution based on gender, and lack of probable cause. (*See id.* at
9-13.) They do not address J.L.'s Fourteenth Amendment due process rights. (*See generally id.*;
see also SAC ¶ 113.)

1 i. National Origin

2 City Defendants first challenge Plaintiffs’ “national-origin claim.” (*Id.* at 10.)

3 City Defendants focus on Plaintiffs’ allegations regarding Officer D’Amico’s failure to

4 use an interpreter when interviewing Ms. Chen. (*Id.* at 10-11; SAC ¶¶ 112, 114-15.)

5 They argue that there is no constitutional right to an interpreter during a noncustodial

6 interview, and thus Ms. Chen fails to state a claim—and cannot do so, even with further

7 amendment—for national origin discrimination. (*See id.* at 11.) In response, Plaintiffs

8 clarify that their constitutional claims referring to Officer D’Amico’s failure to use an

9 interpreter are based in unlawful discrimination, not on a constitutional right to an

10 interpreter.⁹ (*See Resp.* at 12.) Based on that clarification, the court construes Plaintiffs’

11 complaint as pleading only an Equal Protection claim based on national origin

12 discrimination and accordingly addresses that claim.¹⁰

13 The Equal Protection Clause of the Fourteenth Amendment directs that “all

14 similarly situated persons . . . be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*,

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16 ⁹ In any event, although a criminal defendant has a constitutional right to an interpreter in
17 certain circumstances, the Ninth Circuit has not recognized a right to an interpreter during a
18 police interview. *See United States v. Mayans*, 17 F.3d 1174, 1180 (9th Cir. 1994) (“Various
19 cases have recognized a constitutional right to an interpreter.”); *see also United States v. Si*, 333
20 F.3d 1041, 1042 (9th Cir. 2003) (“In a judicial proceeding where a defendant lacks the ability to
21 speak or understand English, an interpreter can be essential for ensuring a fair trial.”).

22 ¹⁰ To the extent Plaintiffs intend to bring a substantive due process claim under the
Fourteenth Amendment for the alleged discrimination, they are unable to do so. (*See SAC*
¶ 112); *see Johnson v. State of Cal.*, 207 F.3d 650, 656 (9th Cir. 2000) (affirming dismissal of
substantive due process claims with prejudice because “the Equal Protection Clause covers the
actions challenged in the complaint”); *Hufford v. McEnaney*, 249 F.3d 1142, 1151 (9th Cir.
2001) (“When a plaintiff’s claim can be analyzed under an explicit textual source of rights in the
Constitution, a court should not resort to the more subjective standard of substantive due
process.” (internal quotation marks omitted)).

1 473 U.S. 432, 439 (1985). To state a claim under Section 1983 for violation of the Equal
2 Protection Clause, the plaintiff must plead facts supporting the reasonable inference that
3 the defendant “acted with an intent or purpose to discriminate against the plaintiff based
4 upon membership in a protected class.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th
5 Cir. 1998). A plaintiff must therefore allege that “a class that is similarly situated has
6 been treated disparately,” *Christian Gospel Church, Inc. v. City & Cty. of S.F.*, 896 F.2d
7 1221, 1225-26 (9th Cir. 1990), and that the defendant acted with discriminatory intent,
8 *Barren*, 152 F.3d at 1194.

9 Plaintiffs plead no facts regarding the City’s use of interpreters in general or the
10 use of interpreters for similarly situated individuals. (See SAC.) They allege only that
11 Officer D’Amico violated the Equal Protection Clause “by depriving Ms. Chen of an
12 opportunity to provide exculpatory testimony through an interpreter” because of Officer
13 D’Amico’s “bias against Ms. Chen’s national origin and/or ethnicity.” (*Id.* ¶ 115.) That
14 statement—uncoupled from any allegations regarding similarly situated individuals,
15 Officer D’Amico’s discriminatory intent, or even the City’s use of interpreters in
16 general—fails to state an equal protection claim for national origin discrimination. *See*
17 *Lam v. City & Cty. of S.F.*, 868 F. Supp. 2d 928, 951 (N.D. Cal. 2012). Nevertheless,
18 contrary to City Defendants’ contention, the court cannot conclude at this time that Ms.
19 Chen could not plead any facts supporting such a claim. Thus, the court grants Plaintiffs
20 leave to amend.

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1 ii. Gender

2 City Defendants next argue that Plaintiffs' claim regarding gender discrimination
3 is meritless because Ms. Chen does not have a "constitutional right to have Mr. Lian
4 prosecuted." (*Id.* at 13.) But City Defendants mischaracterize the right alleged; Plaintiffs
5 assert that Ms. Chen was selectively prosecuted because of her gender. (*See SAC ¶ 114;*
6 *Resp.* at 11.)

7 A selective prosecution claim is a specific kind of an equal protection claim for
8 which a plaintiff must allege facts supporting the reasonable inference that similarly
9 situated individuals of another gender "could have been prosecuted but were not."¹¹ *See*
10 *United States v. Ford*, No. 3:14-cr-00045-HZ, 2016 WL 4443167, at *4 (D. Or. Aug. 22,
11 2016); *see also United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003)
12 (stating that to prove discriminatory effect, a defendant must show that similarly situated
13 individuals of a different ethnic origin were not prosecuted). Individuals are similarly
14 situated "when their circumstances present no distinguishable legitimate prosecutorial
15 factors that might justify making different prosecutorial decisions with respect to them."
16 *Id.* (quoting *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996)). Discriminatory
17 intent requires that the prosecutor took a course of action at least in part because of "its
18 adverse effects upon an identifiable group." *Id.* at *7 (internal quotation marks omitted).

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21 ¹¹ Although Plaintiffs style their claim as one of selective prosecution (SAC ¶ 115), their
22 claim may be more aptly described as a selective enforcement claim based on differential
treatment in investigation and arrest. However, a selective enforcement claim is substantially
similar to a selective prosecution claim. *See Lacey*, 693 F.3d at 920.

1 As with their national origin claim, Plaintiffs allege no facts related to Officer
2 D'Amico's discriminatory intent in referring Ms. Chen for prosecution. (*See generally*
3 SAC.) The court therefore dismisses the selective prosecution claim because the
4 complaint contains no allegations giving rise to a plausible inference of discriminatory
5 intent or motive.¹² (*See generally id.*) However, the court cannot conclude at this time
6 that Plaintiffs cannot allege any facts supporting a claim. Thus, the court grants leave to
7 amend.

iii. Probable Cause

9 Lastly, City Defendants state that if Plaintiffs “intend to allege the existence of” a
10 policy encouraging false statements in probable cause affidavits, “they should identify it
11 in their response.” (MTD at 13.) If Plaintiffs fail to do so, City Defendants argue that the
12 court should deny leave to amend. (*Id.*) City Defendants’ argument falls short, however,
13 because Plaintiffs are not required to identify specific amendments to their complaint in
14 responsive briefing. Although Plaintiffs fail to plead sufficient facts regarding the City’s
15 policies or lack thereof, nothing in City Defendants’ briefing convinces the court that
16 amendment of the *Monell* claims related to probable cause would be futile. *See supra*
17 § III.B.1.

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¹² Despite City Defendants' statement that a selective prosecution claim cannot be based on differential treatment between Ms. Chen and only one other person—Mr. Lian—at least one other court has said such an allegation is sufficient at the pleading stage. (*See* MTD at 13 n.5); *Williams v. Cty. of Alameda*, 26 F. Supp. 3d 925, 942 (N.D. Cal. 2014) (declining to dismiss the plaintiff's equal protection claim because he identified "his fiancé as a[similarly situated] individual [to] whom he can be compared").

1 For these reasons, the court dismisses the Equal Protection Clause claims for
2 national origin and gender discrimination but denies City Defendants' request to prohibit
3 leave to amend Plaintiffs' Section 1983 claims against the City and the constitutional
4 violations underlying those claims.¹³

5 2. Qualified Immunity

6 City Defendants next argue that qualified immunity bars Plaintiffs' Equal
7 Protection claims for national origin and gender discrimination. (Mot. at 10-16.)
8 Qualified immunity shields government officials from suits for civil liability unless the
9 official violated a clearly established statutory or constitutional right of which a
10 reasonable person would have known. *Reichle v. Howards*, 566 U.S. 658, 654 (2012).
11 The court must determine whether (1) the plaintiff sufficiently alleges that an official's
12 conduct violated a constitutional right, and (2) the right was clearly established at the
13 time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). "A right is
14 clearly established when the contours of the right [are] sufficiently clear that a reasonable
15 official would understand that what he is doing violates that right." *Castro v. Cty. of*
16 *L.A.*, 833 F.3d 1060, 1067 (9th Cir. 2016) (internal quotation marks omitted; alteration in
17 original). The court may address either inquiry first. *Pearson*, 555 U.S. at 236. Where a
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19 ¹³ In their response to City Defendants' motion to dismiss, Plaintiffs contend that their
20 complaint contains a claim for "improper intrusions into their constitutionally protected liberty
21 interest in familial relations." (Resp. at 15 n.2.) And on February 1, 2018, Plaintiffs filed a
22 notice of supplemental authority, alerting the court to the Ninth Circuit's decision in *Demaree v.*
Pederson, 880 F.3d 1066 (9th Cir. 2018) (per curiam), which involved the "well-elaborated
constitutional right to live together without governmental interference," *id.* at 1069 (internal
quotation marks omitted). However, Plaintiffs have not asserted such a claim against City
Defendants. (*See generally* SAC.)

1 defendant presents a qualified immunity defense in a Rule 12(b)(6) motion, “dismissal is
2 not appropriate unless [the court] can determine, based on the complaint itself, that
3 qualified immunity applies.” *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001).

4 To make their qualified immunity argument, City Defendants refer to their
5 arguments that amendment of Plaintiffs’ constitutional claims would be futile.¹⁴ (MTD at
6 16.) For the reasons stated above, Plaintiffs fail to state constitutional claims under the
7 Equal Protection Clause, which satisfies the first prong of the qualified immunity analysis
8 as to those claims.¹⁵ *See supra* § III.B.1.a-b. Because Plaintiffs’ constitutional claims
9 fail for lack of sufficient factual allegations rather than the lack of a cognizable legal
10 theory, the court’s dismissal on this basis is with leave to amend. *See Elsmore v. Patrol*,
11 No. ED CV 15-1556 RGK (MRW), 2016 WL 4479547, at *1 (C.D. Cal. July 26, 2016)
12 (granting leave to amend after dismissing the complaint based on qualified immunity
13 grounds); *Bradley v. Crowther*, No. 2:17-CV-93 TS, 2017 WL 3037377, at *3 n.16 (D.
14 Utah July 17, 2017) (collecting cases); *cf. Morales v. Fry*, 873 F.3d 817, 823 (9th Cir.
15
16

16¹⁴ Because City Defendants did not actually address the substance of Plaintiffs’ lack of
17 probable cause claims (*see* MTD at 13, 15), the court construes the motion to dismiss as
requesting dismissal of only the equal protection claims on this ground.

18¹⁵ City Defendants also state in cursory fashion that the constitutional rights alleged are
19 were not clearly established at the time of the alleged violations. (*See* MTD at 16 (“There is no
clearly established right to an interpreter in a non-custodial interview. Nor does focusing a
20 criminal child-abuse investigation on one parent violate any clearly established rights.”).)
However, as the court discussed above, City Defendants mischaracterize Plaintiffs’ claimed
21 constitutional rights and Plaintiffs clarify that they do not assert a constitutional right to an
interpreter during a police interview. *See supra* § III.B.1.a. Moreover, the right to be free from
national origin and gender discrimination in criminal proceedings is clearly established, *see*
22 *Elliot-Park v. Manglona*, 592 F.3d 1003, 1008-09 (9th Cir. 2010), although the court will revisit
this issue if City Defendants assert the qualified immunity defense again.

1 2017) (stating that “qualified immunity was conceived of as a summary judgment
2 vehicle”). However, City Defendants may raise a qualified immunity defense again in
3 response to a future amended complaint.

4 3. Statute of Limitations

5 City Defendants next contend that Plaintiffs’ claims against Chief Gibson and
6 Assistant Chief Wilson are barred by the applicable statute of limitations. State law
7 provides the statute of limitations for Section 1983 suits, *Trimble v. City of Santa Rosa*,
8 49 F.3d 583, 585 (9th Cir. 1995) (per curiam), and Washington applies its three-year
9 statute of limitations for personal injury suits to Section 1983 claims, *Southwick v. Seattle*
10 *Police Officer John Doe #s 1-5*, 186 P.3d 1089, 1092 (Wash. Ct. App. 1998). Federal
11 law, however, dictates when a cause of action accrues and the limitations period begins to
12 run. *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017). Federal law
13 provides that a claim accrues “when the plaintiff knows or has reason to know of the
14 injury which is the basis of the action.” *Maldonado v. Harris*, 370 F.3d 945, 955 (9th
15 Cir. 2004).

16 The parties dispute when the limitations period began to run on Plaintiffs’ claims.
17 City Defendants contend that Ms. Chen’s gender and national origin discrimination
18 claims accrued no later than February 18, 2014, and therefore expired on February 18,
19 2017.¹⁶ (MTD at 17.) Ms. Chen and Mr. Lian filed the suit involving City Defendants
20 on March 17, 2017, in King County Superior Court. *Chen, et al. v. City of Redmond*,

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22 ¹⁶ City Defendants state that Ms. Chen was arraigned on February 18, 2014. (MTD at
17.) However, Plaintiffs’ complaint states only that Ms. Chen was arraigned “in early 2014.”

1 No. C17-0569JLR, Dkt. # 1. Plaintiffs contend that their claims accrued at the
2 termination of criminal proceedings against Ms. Chen on September 19, 2014, because
3 the alleged “wrongful acts . . . are part of a continuous and connected string of wrongful
4 acts” that concluded on that date.¹⁷ (Resp. at 18.) The only support they offer for this
5 theory is that a malicious prosecution claim accrues when the proceedings against a
6 plaintiff terminate such that they cannot be revived. (*See id.* at 19 (citing *Bradford v.*
7 *Scherschligt*, 803 F.3d 382, 387 (9th Cir. 2015).)

8 Based on the facts in the complaint, the court reasonably infers that by the time
9 Ms. Chen was arraigned “in early 2014,” she knew or had reason to know of any national
10 origin discrimination arising from Officer D’Amico’s failure to use an interpreter in
11 interviewing her prior to the charges and of any gender discrimination arising from the
12 choice to prosecute Ms. Chen but not Mr. Lian for the same conduct. (*See SAC ¶¶ 112,*
13 *114-15.*) Thus, the statute of limitations bars those claims, and the court dismisses them
14 on this basis. The court’s dismissal is without prejudice, however, because there is no
15 indication that Plaintiffs could not amend their complaint to allege facts that they became
16

17 (SAC ¶ 87.) Because the court only looks at the complaint in determining its sufficiency and
18 City Defendants have not requested judicial notice of the arraignment date (*see generally* MTD),
the court does not credit the February 18, 2014, date as the specific date of the arraignment.

19 ¹⁷ Plaintiffs also argue that because J.L. and L.L. are minor children, their claims are not
20 time-barred. (Resp. at 18.) City Defendants state only that “Plaintiffs do not allege any violation
21 of J.L.’s or L.L.’s constitutional rights by City Defendants.” (Reply (Dkt. # 82) at 10.)
However, Plaintiffs allege that City Defendants violated J.L.’s Fourteenth Amendment rights in
22 his dependency action. (SAC ¶ 113.) Because City Defendants misread the complaint in this
regard and provide no further argument, the court declines to address the constitutional claim
brought specifically by J.L. In addition, City Defendants move to dismiss only the claims
against Chief Gibson and Assistant Chief Wilson on this basis.

1 aware of the injury at a later time upon learning, for example, of an allegedly
2 unconstitutional policy of differential treatment in the provision of interpreters or
3 prosecution. *See supra* § III.B.1.a-b (giving Plaintiffs leave to amend to state a claim of
4 municipal liability based on a policy or inaction).

5 Plaintiffs' constitutional claims related to lack of probable cause and their claim of
6 malicious prosecution are subject to a slightly different analysis. Plaintiffs allege that
7 Officer D'Amico obtained an arrest warrant for Ms. Chen that was "not founded on
8 probable cause" (SAC ¶ 110) and submitted "a probable cause affidavit that contained
9 material falsehoods and omissions that failed to acknowledge exculpatory evidence" (*id.*
10 ¶ 111). Based on those allegations, Plaintiffs appear to assert a judicial deception claim,
11 which involves "false or misleading misrepresentations that may not be readily apparent
12 at the time" a warrant is executed. *See Klein*, 865 F.3d at 1279 ("In a traditional Fourth
13 Amendment case, the plaintiff is placed on constructive notice of the illegal conduct
14 when the search and seizure takes place."). "In order to discover the underlying illegality
15 in a judicial deception case, the plaintiff must have access to the underlying affidavit."
16 *Id.* Such a claim begins to accrue "when the underlying affidavit" becomes "reasonably
17 available." *Id.* at 1278-79.

18 Here, construing the complaint in the light most favorable to Plaintiffs, the factual
19 allegations give rise to the reasonable inference that Ms. Chen learned of the false or
20 misleading representations in the affidavit at the time she was charged or arraigned. (*See*
21 SAC ¶¶ 86 (alleging that on January 31, 2014, the Prosecuting Attorney filed a criminal
22 information that contained Officer D'Amico's probable cause affidavit), 87 ("In early

1 2014, Ms. Chen appeared . . . for arraignment in her criminal case.”).) The court
2 therefore dismisses these claims as to Chief Gibson and Assistant Chief Wilson.¹⁸
3 However, the court grants Plaintiffs leave to amend the complaint to allege facts
4 regarding when Ms. Chen became aware of the misrepresentations because at this time,
5 amendment would not be futile.

6 Finally, Plaintiffs’ malicious prosecution claim against Chief Gibson and Assistant
7 Chief Wilson accrued when the criminal proceedings against Ms. Chen terminated. *See*
8 *Bradford*, 803 F.3d at 387. Those proceedings ended on September 19, 2014 (SAC ¶ 88);
9 thus, Plaintiffs’ malicious prosecution claim is timely, and the court denies the motion to
10 dismiss this claim. The court notes that City Defendants also include a paragraph in
11 which they assert that Plaintiffs fail to adequately plead the malicious prosecution claim
12 because they do not “allege any wrongful conduct.” (MTD at 19.) However, City
13 Defendants provide no substantive argument or legal authority on this point. Thus, the
14 court declines at this time to address the sufficiency of the claim.

15 **C. Leave to Amend**

16 In summary, the court grants City Defendants’ motion to dismiss Plaintiffs’ claims
17 against the City for failure to adequately allege municipal liability; the underlying Equal
18 Protection Clause claims against Officer D’Amico, Chief Gibson, and Assistant Chief
19 Wilson for failure to plead sufficient facts supporting those claims and on the basis of
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21 ¹⁸ Because the court concludes that the constitutional claims against Chief Gibson and
22 Assistant Chief Wilson pursuant to Section 1983 are time-barred and dismisses on that basis, the
court declines to address City Defendants’ argument that Plaintiffs fail to adequately plead
supervisory liability for those claims. (*See* MTD at 18-19.)

1 qualified immunity; and the constitutional claims related to lack of probable cause against
2 Chief Gibson and Assistant Chief Wilson as barred by the statute of limitations. The
3 court denies the City's motion to dismiss the probable cause malicious prosecution claim
4 against Chief Gibson and Assistant Chief Wilson. The court grants Plaintiffs leave to
5 amend the dismissed claims, however, because there is no indication at this time that
6 leave to amend would be futile.

7 The court cautions Plaintiffs that they will not receive multiple opportunities to
8 amend their complaint. Their failure to allege sufficient facts giving rise to their
9 constitutional claims and the City's liability for the asserted violations will demonstrate
10 that further amendment would be futile. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
11 (9th Cir. 1992) (affirming dismissal with prejudice where district court had instructed the
12 *pro se* plaintiff regarding the deficiencies in a prior order and granted leave to amend); *cf.*
13 *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (“The district
14 court’s discretion to deny leave to amend is particularly broad where plaintiff has
15 previously amended the complaint.”).

16 **IV. CONCLUSION**

17 For the reasons set forth above, the court GRANTS in part and DENIES in part
18 City Defendants’ motion to dismiss (Dkt. # 79) with leave to amend as described herein.
19 The court also DENIES as moot City Defendants’ previously filed motion to dismiss
20 (Dkt. # 66). Plaintiffs must file their amended complaint, if any, no later than twenty (20)
21 days from the entry of this order. Failure to file an amended complaint or to remedy the
22 //

1 deficiencies identified in this order will result in the court dismissing the matter without
2 leave to amend.

Dated this 27th day of March, 2018.



JAMES L. ROBART
United States District Judge